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Supreme Court of the United States

OCTOBER TERM, 1944

No. **956**

MRS. S. W. C. LUMPKIN, PETITIONER,

versus

WM. P. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR
THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF

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Petition for Writ of Certiorari Filed -----

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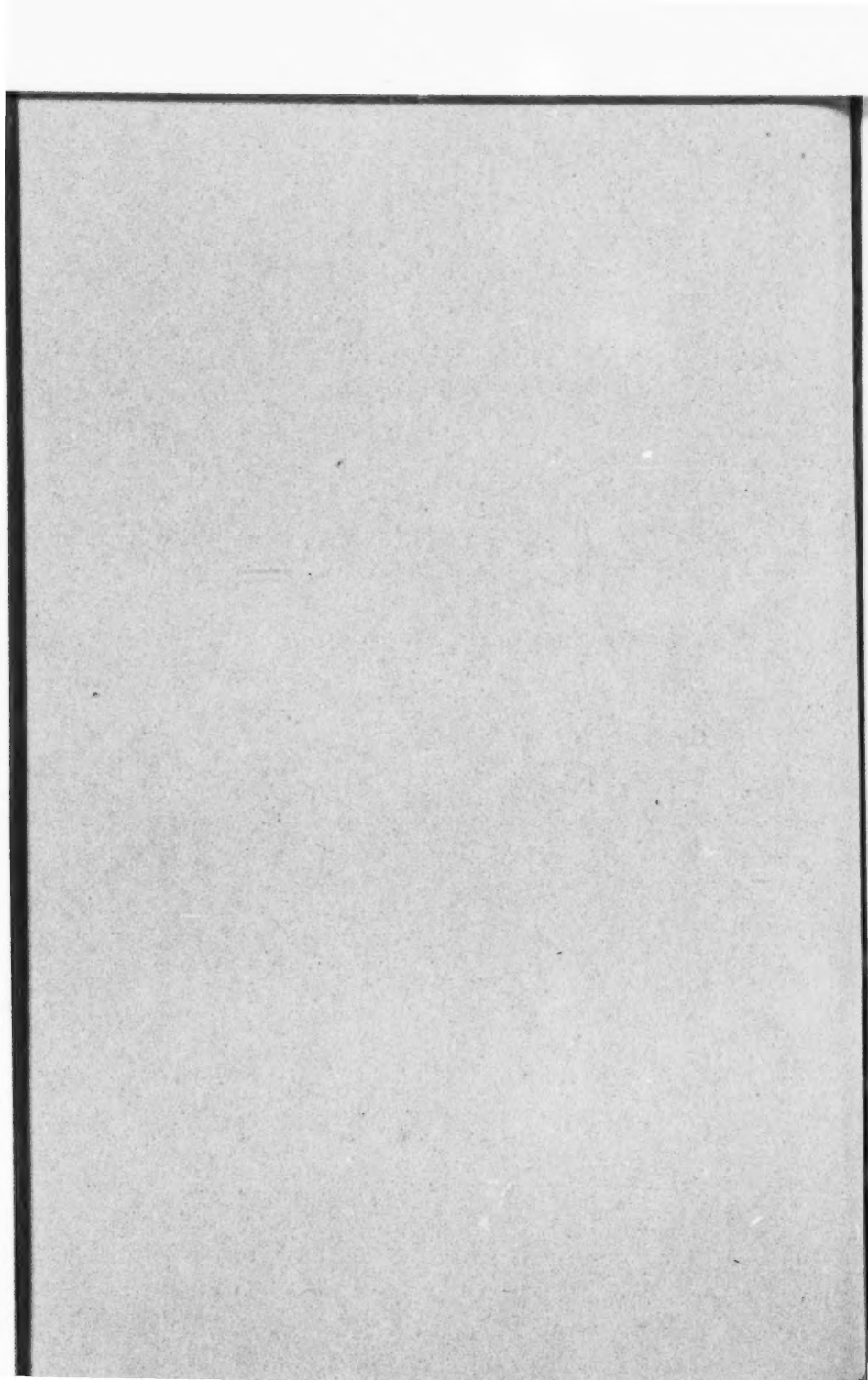


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CUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT
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To the Honorable, the Supreme Court of the United States:

I

This is an application for a Writ of Certiorari for a review of the decision of the United States Circuit Court of Appeals of the Fourth Circuit reversing a judgment of the United States District Court for the Eastern District of South Carolina.

II

Summary Statement of the Matter Involved

This is an action at law instituted in the District Court of the United States for the Eastern District of South Car-

olina by the petitioner herein against the respondent for the recovery of individual federal income taxes alleged to have been overpaid for the years 1936 and 1937, upon the ground that such taxes were illegally assessed and collected.

The petitioner had a life interest under a trust created for her benefit in one-half of the stock of a corporation which was the owner of valuable franchise rights in the sale and distribution of coca-cola syrup. At the time her brother-in-law owned the other one-half interest in the stock of said company and upon his death in 1929 his stock interest in said company passed under his will to five trustees to hold the same for the benefit of an orphanage asylum. Thereafter, in 1930, the petitioner purchased the stock from the trustees for \$255,885.00, and she continued to hold the same and enjoy the dividends and profits flowing therefrom. The record discloses that one-half of the average yearly income of said company for the years 1929 to 1935 was more than \$21,820.34. In 1936 a suit was instituted against the petitioner in the courts of South Carolina, on Relation of the Attorney General, wherein it was sought to have the sale of the said stock rescinded upon repayment to petitioner of the purchase price thereof, with interest, and to require the petitioner to account for all income and profits received from said stock since she acquired it from the trustees. It was claimed in said action that the said trustees were not authorized under the will to make such sale. The petitioner, for the necessary protection and conservation of her rights and interest in said stock, including dividends received therefrom, retained attorneys to represent her interest in said action, and incurred other expenses in the defense thereof; the action was tried in due course and was finally terminated by the judgment of the Supreme Court of South Carolina adjudicating that said sale had been lawfully made. In connection with this litigation the petitioner

incurred expenses of \$250.00 in 1936 and \$26,250.00 in 1937, covering costs and attorneys' fees, which sums were deducted from the gross income in computing her net income tax for these years. The Commissioner of Internal Revenue disallowed these deductions and assessed additional taxes and interest against her of \$155.00 for the year 1936 and \$19,187.72 for the year 1937. These deficiency taxes were paid under protest and form the basis of this action.

The petitioner claims that expenditures made by her covering attorneys' fees and other legal expenses in the defense of a suit brought against her to set aside the sale to her of shares of capital stock in a corporation held for the production of income are properly deductible expenses in computing net income under Section 23(a) of the Revenue Act of 1936, as amended by Section 121 of the Revenue Act of 1942 (56 Stats. 798, 819), which amendment was by its terms retroactive.

The position taken by the respondent is that the attorneys' fees and other legal expenses incurred by the taxpayer in the defense of title to stock were capital expenditures to be added to the cost of the stock, and therefore not deductible.

Proceedings Below: The District Court held that the expenditures made by the petitioner were ordinary and necessary and were incurred for the purpose of preserving and conserving valuable property held by her for the production of income and to make secure the income she had already received, and upon which she had previously paid income taxes. It was held that even though such expenses were primarily incurred in the defense of title to stock in a corporation, such expenses were deductible in that they were expended for the conservation, maintenance and management of property held for the production of income and therefore such expenses were deductible under the Act,

as amended. Judgment was accordingly rendered in favor of the petitioner against the respondent in the sum of \$22,-680.10.

The Circuit Court reversed the judgment of the District Court and held that such expenses were not deductible under said Act, as amended, upon the following grounds:

(a) The purpose of the amendment was to permit deductions for certain "non-trade" or "non-business" expenses, and to thereby enlarge the allowable deductions which under previous Revenue Acts had been confined to "expenses paid or incurred in carrying on of any trade or business".

(b) It was not the intention of Congress to remove any other restrictions or limitations applicable to the deductions under the Act.

(c) Prior to the amendment it was uniformly provided that expenses incurred in defending or protecting title to property were not "ordinary and necessary expenses" and therefore not deductible.

(d) That the Congress used the phrase "all ordinary and necessary expenses", under the caption of "non-trade or non-business expenses" in the same sense and with the same limitations as it had previously used in connection with trade or business expenses.

(e) The expenses were incurred in the defense and protection of title to property and therefore, under the Treasury Regulations and decision of the Court's interpretative thereof, are not "ordinary and necessary expenses" and accordingly not deductible.

(f) The term "conservation" as used in the amendment cannot be given the meaning contended for by the petitioner without losing sight of the purpose which Congress intended to accomplish and the settled meaning that the

phrase "ordinary and necessary expenses" has been given in the administration and re-enactment of the Federal Income Tax Statutes.

III

Reasons Relied on for the Allowance of the Writ

(1) The decision of the Circuit Court of Appeals is erroneous in that it did not interpret Section 23(a) of the Revenue Act of 1936, as amended by Section 121 of the Revenue Act of 1942 (56 Stats. 798, 819), in accordance with the ordinary, popular or received import of the words used therein. Thereby the Court decided an important Federal question in a way probably in conflict with applicable decisions of this Court. *Deputy et al. v. DuPont*, 308 U. S., 488, 60 S. Ct. Rep., 363, 84 L. Ed., 416; *A Magnano Co. v. Hamilton*, 292 U. S., 40, 54 S. Ct. Rep., 599, 78 L. Ed., 1109; *Mailard v. Lawrence*, 16 How., 251, 261; 14 L. Ed., 925.

(2) The decision of the Circuit Court of Appeals is erroneous in that it interpreted the term "conservation" as used in the Revenue Act of 1942, in a narrow and restricted sense and in a way to defeat the plain and obvious intent of Congress. Thereby the Court decided an important Federal question in a way probably in conflict with applicable decisions of this Court, and in a way probably untenable and in conflict with the weight of authority. *Helvering v. Hammel*, 311 U. S., 504, 61 S. Ct. Rep., 368, 85 L. Ed., 303, 131 A. L. R., 1431; *Helvering v. Stockholms Enskilda Bank*, 293 U. S., 84, 55 S. Ct. Rep., 50, 79 L. Ed., 211.

3. The decision of the Circuit Court of Appeals is erroneous in that under the terms of Section 23(a) of the Revenue Act of 1936, as amended by Section 121 of the Revenue Act of 1942, (56 Stats. 798, 819), expenses incurred in the conservation of property held for the production of

income are deductible even though such expenses were incurred in defense of a law suit involving title to such property. Thereby the Court decided an important question of Federal law which has not been, but which should be settled by this Court.

4. The decision of the Circuit Court of Appeals is erroneous in that it holds that Congress, in amending Section 23(a) of the Internal Revenue Code by the Revenue Act of 1942, used the phrase "all the ordinary and necessary expenses"; under the caption "non-trade or non-business expenses" in the same sense and within the same limitations that it had previously used in connection with trade and business expenses, which construction was not consonant with the purposes of the statute as disclosed by its structure. Thereby the Court decided an important Federal question in a way probably in conflict with applicable decisions of this Court, *Helvering v. Hammel*, 311 U. S., 504, 61 S. Ct. Rep., 368, 85 L. Ed., 303, 131 A. L. R., 1431.

5. The Circuit Court of Appeals erred in failing and refusing to hold that by operation of the 1942 amendment the regulations promulgated by the Secretary of the Treasury, to the effect that expenses incurred in defending title to property are not deductible in computing net income, are a nullity and unenforceable with respect to expenses incurred in defending title to property held for the production of income. Therefore the Court decided an important Federal question in a way probably in conflict to applicable decisions of this Court. *Koshland v. Helvering*, 298 U. S., 441, 56 S. Ct. Rep., 767, 80 L. Ed., 1268; *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U. S., 129, 56 S. Ct. Rep., 397, 80 L. Ed., 528.

6. The Circuit Court of Appeals erred in giving application and effect to regulations promulgated by the Secretary of the Treasury which are in conflict with and neces-

sarily restrict the clear and unambiguous provisions of Section 23(a) of the Revenue Act of 1936, as amended by Section 121 of the Revenue Act of 1942. Thereby the Court decided an important Federal question in a way probably in conflict with applicable decisions of this Court. *Koshland v. Helvering*, 298 U. S., 441, 56 S. Ct. Rep., 767, 80 L. Ed., 1268; *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U. S., 129, 56 S. Ct. Rep., 397, 80 L. Ed., 528.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fourth Circuit, demanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its Docket 5200, Wm. P. Bowers, Collector of Internal Revenue, Appellant, versus Mrs. S. W. C. Lumpkin, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment of the Circuit Court of Appeals may be reversed by the Court, and for such further relief as this Court may deem proper.

Respectfully submitted,

PINCKNEY L. CAIN,
R. BEVERLEY HERBERT,
Attorneys for Petitioner.

Columbia, S. C.,
April 13, 1944.